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Founded 1962

August 18, 2004

Commissioner's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: Notice of Proposed Rulemaking
Retention of Broadcast Recordings
MM Docket No. 04-232

We enclose herewith an original and four copies of our "Comments" in the above captioned proceeding.

Sincerely,

Paul J. McGeady
General Counsel

PJM/tp

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Retention by	)	MM Docket 04-232
Broadcasters of	)	
Program Recordings	)	

COMMENTS
OF
MORALITY IN MEDIA

In this Notice of Proposed Rulemaking the Federal Communications Commission proposes to require that Televisions and Radio Stations retain program recordings for a period of time for purposes of enforcing 18 U.S.C. 1464 and for other reasons.

The Notice indicates that the Commission intends that the retention period shall be limited, for example 60 to 90 days.

The Notice further indicates that indecent speech is protected by the First Amendment but the airing of such programming is restricted to the hours of 10 p.m. to 6 a.m.

I. Indecent Speech Not Protected

Morality In Media notes, in passing, that it believes that any Notice, such as this, should not give the impression that Indecent Speech in the Broadcast Medium is protected by the First Amendment. If that is so, Pacifica was wrongly decided. If we refer to FCC v. League of Women Voters , 468 U.S. 364, 375 we find that no compelling interest is required to prohibit indecent broadcasts. If we revert to Pacifica we find at 99

S. Ct. 3028 that it says; "We may assume, arguendo, that this monologue would be protected" "in other contexts". It would be more accurate for the FCC to note that "Indecent Speech", as defined by the Federal Communications Commission, in not protected speech during the hours of 6 a.m. to 10 p.m. under the First Amendment. If, as the FCC says, Indecent Speech is protected by the First Amendment any regulation restricting its "airing" between 6 a.m. and 10 p.m. would require a "compelling" governmental interest which the Untied States Supreme Court rejects in League of Women Voters supra.

While it would, on its face appear, that we are off on a tangent, we believe, that the distinction made by the League of Women Voters to the effect that in regulating the broadcast medium there is no requirement that the FCC posit an interest that is "compelling" may, as indicated infra, effect the validity of this rule making. The interest posited by the FCC to substantiate this rule making may be found in the Notice of Proposed Rule making when it says:

> "We seek comment on enhancing our enforcement processes...in order to improve the adjudication of complaints".
>
> and
>
> "It is important that the Commission be afforded as full a record as possible to evaluate allegations of objectionable programming".
>
> and
>
> "Because the specifics and context of the broadcast are critical to the determination of whether material is obscene, indecent or profane, the more information the Commission can have in its possession about a program when it concludes an investigation and decides whether or not to initiate an enforcement proceeding, the more informed a decision it can make".
>
> and
>
> "The Commission may lack a sufficient record when the licensee is unable to provide a tape or transcript in response to an LOI".
>
> and

> "The proposed record retention requirements may aid us in enforcing our children's television commercial limits and sponsorship identification requirements".

II. First Amendment Considerations

Now, it should be observed, that it is expected that industry commentators will attack the proposed rulemaking as ultra vires and as a violation of the First Amendment. It behooves the FCC, if it wishes to defend this proposal, to start from a platform that maintains that it does not need a "compelling" governmental interest to require Retention of Broadcasters Program Recordings, but that a "substantial" or "important" interest is all that is required, using as its touchstone the United States Supreme Court case of FCC v. League of Women voters, supra. It would be of assistance to clarify how any court review of an FCC Requirement to retain a record of Broadcasts would be approached. If an argument is addressed in a court challenge that the rule violates the First Amendment and therefore requires a compelling interest and least restrictive means, the Language of League of Women Voters becomes pertinent on the "Standard of Review", that court stated:

> "We begin by considering the appropriate standard of review. The District Court acknowledged that our decisions have generally applied a different First Amendment standard for broadcast regulation than in other areas, but...in this case held that Section 399 could survive constitutional scrutiny only if it served a "compelling" governmental interest...At first glance, or course, it would appear that the District Court applied the correct standard. Section 399 plainly operates to restrict the expression of editorial opinion on matters of public importance, and, as we have repeatedly explained, communication of this kind is entitled to the most exacting degree of First Amendment Protection...but as the government correctly notes, because broadcast regulation involves unique considerations, our cases... have never gone so far as to demand that such regulations serve "compelling" governmental interests" (Underlining added)...

> "This court's decision in FCC v. Pacifica Foundation...is consistent with the approach taken in other broadcast cases...The governmental interest in reduction of these risks through commission regulation of the timing and character of such "indecent broadcasting" was thought sufficiently substantial to outweigh the broadcaster's First Amendment interest in controlling the presentation of its programming". (Underlining added).

It may be observed, therefore, that the Standard of Review for FCC Regulation of Broadcast activity and the area of a regulation relating to indecent programming does not require the FCC to demonstrate that a compelling governmental interest exists (Note, In this respect the D.C. Circuit erred in Action for Children's Television v. FCC, 852 F. 2d 1332, 1344 in stating that a compelling interest was required and in holding at that page that broadcast material that is indecent, but not obscene is protected by the First Amendment). If it were so protected it could not be prohibited by Pacifica or between the hours of 6 a.m. to 10 p.m.even in Action for Children's Television. It is accurate to say that indecent speech is normally protected by the First Amendment except in Broadcasting. The D.C. Circuit opinion is overridden by the U.S. Supreme Court League of Women Voters).

III. FCC Power

The constitutional issues that, without doubt, will be raised by the industry is whether of not the FCC has power to issue a rule compelling Broadcasters to maintain a record of their programming for perusal by the FCC in processing complaints of Indecent, Profane or Obscene Programming. The FCC has cited for its authority Sections 1, 2, 4(i), 303 and 307 of the Communications Act. A quick review of the authority therein conferred shows the following:

> Section 1-Gives authority to the FCC "to execute and enforce the provisions of this Act".

Section 2-The act applies "to all person engaged within the United States in such Communications"... "and to the licensing and regulating of all radio stations"..."this Act shall apply with respect to Cable Service".

Section 4(i)-Provides that the Commission "may perform any and all acts", (and) "make such rules and regulations, and issue such orders...as may be necessary in the execution of its functions".

Section 303(j)-Gives the Commission authority "to make general rules and regulations requiring stations to "keep such records of programs...communications, or signals as it may deem desirable".

Section 303(r)-Gives this Commission authority to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act".

Section 307 (e)(2)-Provides that "any radio station operator who is authorized...to operate without a license shall comply...with rules prescribed by the Commission under this Act".

From this, we conclude that the Commission, may make such rules as it deems desirable in the execution of its functions [(4)(i)] not inconsistent with law [(303(r)] and is specifically authorized to require stations to "keep such records of programs as it may deem desirable" and that such authority applies with respect to Cable Service.

It is apparent that there is no specific law prohibiting the Commission from requiring Radio, TV and Cable stations to "Retain Program Recordings". In fact, the opposite is true. The Commission is specifically authorized to require such recordings if the Commission "deems the same desirable".

Under such circumstances the only possible objection that the Industry could raise would be a constitutional one. Neither the First Amendment nor Section 326 would appear to assist Industry for the simple reason that there is no freedom violated. This is not a question of censorship since the broadcast has already been broadcast without

restraint. The possibility of subsequent punishment arises from the original broadcast not, after the fact, Commission activity. In Pacifica the court said:

> "Entirely apart from the fact that the subsequent review of programs context is not the sort of censorship at which the statute was directed, its history makes it perfectly clear that it was not intended to limit the Commission's power to regulate the broadcast of obscene, indecent or profane language".

We may assume, therefore, that Pacifica, combined with 303(j), and related sections and Red Lion gives the Commission authority to require these recordings without a violation of the First Amendment.

IV. Fifth Amendment Not Applicable

Obviously, the Fifth Amendment's self incrimination provision does not apply since a corporation cannot assert that privilege. In Braswell v. United States, 487 U.S. 99, the United States Supreme Court said:

> "It is well established that such artificial entities are not protected by the Fifth Amendment".

V. Best Evidence

It is also true that program recording complies with the "best evidence" rule. As the Commission notes in its Notice, it is important that the "Commission be afforded as full a record as possible to evaluate allegations of Objectionable Programming". The present system of requiring the information to be produced by the complainant will not afford the Commission with a full record in many cases. Often the Indecent material comes in the middle of a program, unexpectedly. We cannot expect a consumer to know that this is going to happen nor can we expect a consumer to tape every program from the beginning or even in the middle. Certainly he or she cannot be expected to have pen, pencil and paper in hand to "record significant excerpts". The tradition in this country,

both for state and federal law, is to protect the consumer from being assaulted by porn in the first place. We put the onus in our statutes on the purveyor of the obscenity or indecency not on the assaulted.

It is important, too, to recognize that the Commission does not record programs and that determinations are made in "context". "Significant Excerpts" may not be enough in a particular case to capture the "context".

Another quotation from Pacifica is applicable:

> "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content".

This phenomenon, recognized in Pacifica, further militates against putting the onus on the citizen to record the program or prepare "Significant Excerpts".

VI. Proposals For Exceptions

Now, while Morality In Media agrees with the concept of the proposed rule, we, nevertheless, suggest that it may not be necessary for all Radio and TV Licensees to "tape every program" and that such a requirement might violate the Due Process provision of the Fourteenth Amendment. As was said in Nebbia v. People of the State of New York, 291 U.S. 502, Due Process requires that laws not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relationship to the object to be obtained. Applying this caveat to the FCC Rule under consideration, we are met with the fact that a blanket requirement that all Radio and TV Licensees retain a recording of every program could be "unreasonable" and "arbitrary" and may not have a "rational relationship" to the object to be obtained.

We pose this as a possibility because many (and perhaps most) Radio or non-Cable TV Licensees do not even get close to violating 18 U.S.C. 1464. To subject such stations to the expense of recording every program may very well result in a due process violation. We believe the rule should be subject to more tailoring and still achieve the FCC's objective and avoid being struck down.

In view of the above, it is the suggestion of Morality In Media that the Commission carve out an exemption from the Program/Recording Requirement which will comply with the Fourteenth Amendment requirement of Due Process which could read as follows:

The requirement of Retention by Broadcasters of Program Recordings shall not apply if the programming (including advertisements) does not contain descriptions or depictions (actual or simulated or created by computer technology) of any of the following:

1. Sexual Intercourse
2. Sodomy
3. Cunnilingus
4. Fellatio
5. Masturbation
6. Excretory Functions
7. Sadism
8. Sadomasochism
9. Flagellation
10. Necrophilia

11. Rape

12. Child Porn

13. Group or Multiple Sexual Activity

14. Sexual Violence

15. Bestiality

16. Ejaculation

17. Menage a Trois

18. Sexually suggestive removal of the clothing of another person

19. Snuff Films

20. Animal Copulation

21. Penis or Vagina

22. Lap Dancing

23. Nude, or Lewd Dancing

24. Sexual Devices including Dildoes and Artificial Vagina

25. Nude Breast of a Pubescent Female

26. Nude Buttock or Perineum

27. Nude Anus, Vulva or Pubic Region

28. Genitals

29. Fetishism

30. Frottage

31. Tactile Sexual Contact

32. Passionate or French Kissing

33. Wet Nightgown or Nude Wrestling Performances

34. Placing of money or other objects into costumes of dancers

35. Strip Tease

36. Other sexual or excretory activities or organs

37. Violence

38. Attempts to commit any of the above enumerated activities

39. Profanity

"Nude", in Item 25, shall mean any one or more of the depictions or descriptions or simulations thereof included in Items 25, 26, 27, 28 or 35 (even if covered with skin colored materials such as latex or paint).

"Violence", in Item 36, is violence that is an intense, rough or injurious use of physical force or treatment with the intent to harm which is outrageously offensive or outrageously disgusting.

In the event any one or more of the above enumerated depictions or descriptions is found by a court of competent jurisdiction to be invalidly included, it is the intent of this Commission that the remainder shall continue to be in effect.

VII. Hours of Retention Application

The Notice of Proposed Rulemaking requests comment of whether or not the suggested retention rule should apply only to the period 6 a.m. to 10 p.m. The obvious answer is that is should apply around the clock since it is designed to capture recordings of programs that may violate 18 U.S.C. 1464 which is not restricted to Indecency, but includes Profanity and Obscenity 24 hours a day including Broadcast and Cable. The 6 a.m. to 10 p.m. statute does not apply to Profanity or Obscenity and has nothing to do with whether children will be in the audience. In fact, to exempt programming after 10 p.m. other than indecency, may very well run afoul of the conclusion in Action For Children's Television, 852 F. 2d 1332 (D.C. Cir. 1988) that the FCC, in its rule making,

proceed in a "rational" manner. There is no rationality in restricting recordings of programs relating to obscenity and profanity to 6 a.m. to 10 p.m. when the prohibition in the statute applies around the clock. It would also be at odds with the stated objective of the Notice of Proposed Rulemaking rationale and governmental purpose:

> "To increase the effectiveness of the Commission's process for enforcing restrictions on obscene, indecent and profane broadcast programming".

VIII. Citizen Complaints

Morality In Media agrees that the complaint procedure should be corrected to entertain citizen complaints: "Containing a general description of the relevant broadcast programming" since the recording could then be obtained from the station. It is not the duty of the consumer, but the FCC, to enforce the statute nor should he or she be obliged to make a prima facie case.

Section 1 of the Act gives the FCC jurisdiction over Cable. Cable TV is subject to the Obscenity provisions of Section 639 of the Cable Communications Policy Act of 1984 (now Section 639 of the Communications Acts of 1934). The final Rule should make it quite clear that the Rule also applies to Cable TV, otherwise the Commission may be faced with First Amendment or other constitutional challenges based on differential treatment if there is no rational reason for imposing the Rule only on Radio or Broadcast TV stations.

IX. Copyrights and Contracts

The Notice also request comment on whether or not the Rule requiring that Broadcasters retain recordings of their programming insofar as it might apply to retention of third party commercial material or infomercials, raise copyright or contractual issues.

While the Notice is a bit obscure, it apparently would require a Broadcaster to retain a copy of the Original Programming including commercials and infomercials.

The questions posed is whether this Rule would raise these issues. We have no doubt that these issues will be raised. It would appear advisable to clarify the final rule.

If the original is to be recorded and retained for possible review by the FCC, a contract problem might arise depending, of course, on the terms of the contract.

If there is nothing in the contract forbidding a copy or retention of the same for non-commercial use, it would appear that the Broadcaster has the right to make such copies under the Fair Use Doctrine-and the principles of that doctrine outlined in Sony Corporation v. Universal City Studios, 464 U.S. 417 (1984) and Jartech Inc. v. Clancy, 666 F. 2d 403, (9th Cir. 1983) cert denied 459 U.S. 826 (1984) where the Ninth Circuit affirmed a District Court ruling in which a jury had found that Clancy, as an agent of the City Council of the City of Santa Ana California, legally took pictures and sound recording of a copyrighted motion picture playing in a theater in order for the Council to determine its obscenity and for purposes of determining whether the theatre was a nuisance subject to abatement. This was a permissible "Fair Use" See also Wojnarowicz v. American Family Association, 745 F. Supp. 130 (S.D.N.Y. 1990) (Because Wildmon's use was for purposes of criticizing and commenting on matters of public concern and petitioning the government for redress of grievances, it was protected by the doctrine of Fair Use).

If the FCC follows the copy approach, it should consider whether a copy (not yet made) is a "record" that it has the authority to required be made under 303(j). If the answer is yes, then it is subject to examination.

If the contract for the use of an original program or commercial in some way requires that it be returned or not copied for any use other that a limited Broadcast use the Commission should examine its authority to provide that in all future contracts for such material there be included a provision (if not already included or considered included) that the contract is subject to the Communications Act and all Rules made by the FCC implementing the same.

The Commission should also study the question of whether future or existing contracts for broadcast commercials and infomercials, as a matter of public policy, can be considered modified by statute or a Rule of a federal administrative body which has the force of law.

If all else fails, it would appear that under the Fair Use Doctrine, the FCC could make (or commission others to make) its own "Off-the-Air" recordings.

X. CONCLUSION

The Rule should be adopted, but in order to withstand a constitutional attack, it should be applied only as suggested by Morality In Media. Any suggestion that the exception is arbitrary, capricious or unlawfully discriminatory is met by the fact that one or the other of the listed sexual or indecent depictions or descriptions is a sine qua non for a finding of obscenity or indecency or profanity and by the fact that inclusion of a multitude of innocuous programming would be arbitrary, unreasonable and would prevent the Rule from having a substantial relationship to the object to be obtained.

Respectfully submitted,
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